Distr.
GENERAL

E/CN.4/Sub.2/1993/NGO/2
30 July 1993

ENGLISH
Original: FRENCH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention of Discrimination
and Protection of Minorities
Forty-fifth session
Item 10 (a) of the provisional agenda

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: QUESTION OF THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[16 July 1993]

THE ONLY GENUINE SAFEGUARD FOR ANY PERSON DEPRIVED OF LIBERTY IS AN EFFECTIVE AND ADEQUATE REMEDY

1. Human rights only exist through the operation of positive law, that is, when there is a legal regime such that they are protected by the right of action. Any defendant or detainee has essentially two prerogatives: the right to be brought promptly before a judge or other magistrate empowered by law to exercise judicial functions and the broader right to verification of the lawfulness of the detention by a court, that is, the right to habeas corpus in the strict sense.

2. The first right, that of being brought promptly before a judge, appears as a lex specialis restricted to the particular case of pre-trial detention of any person suspected of having committed a criminal offence. Supervision of detention takes place at the beginning of the deprivation of liberty before the start of the actual pre-trial phase and should be provisional.

3. The same guarantee, sometimes with insignificant differences of wording, is to be found in the major human rights instruments (see art. 5, para. 3, of the European Convention on Human Rights (hereinafter referred to as ECHR); art. 7, para. 5, of the American Convention on Human Rights (hereinafter referred to as ACHR); and article 9, paragraph 3, of the International Covenant on Civil and Political Rights (hereinafter referred to as Covenant II). The African Charter on Human and Peoples' Rights contains no explicit reference to this right or to the right to habeas corpus, but merely refers dangerously to national legislation (see art. 6 of that Charter).

4. The treaty obligation to bring an arrested person before a judge or other magistrate must be unconditional and automatic and, above all, such action must be taken promptly. The interpretation of "promptly" has led to some differences in international jurisprudence: the European Court of Human Rights has accepted a time-limit of four days; the Inter-American Commission on Human Rights has merely ruled that a time-limit of five days violates article 7, paragraph 5, of the ACHR; the Human Rights Committee did not sanction a time-limit of six weeks. Considering some South American national legislation (the Argentine Code of Penal Procedure in its article 186 stipulates a maximum time-limit of six hours; the Uruguayan Constitution in article 16 stipulates 24 hours for the judge to take the defendant's statement and 48 hours for the pre-trial proceedings to start; article 16 of the Colombian Constitution requires that the defendant should be placed at the disposal of the judge within 36 hours) then these international time-limits are a very regrettable minimum.

5. The judge or other magistrate empowered by law to exercise judicial functions must of necessity also be a member of the judiciary stricto senso. When brought before the judge, the defendant has to be able to enjoy certain essential procedural guarantees such as the right to be heard personally and to be assisted by a lawyer. These conditions emerge from the conventional instruments of protection only through jurisprudence; they are nevertheless essential to the effective exercise of the right to be brought before a judge (the same applies to the habeas corpus procedure in the strict sense).

6. The right to habeas corpus, that is, verification of the lawfulness of the detention by a court at the request of any person deprived of liberty, whether in judicial or administrative detention, is provided for in article 5, paragraph 4, of ECHR, in article 7, paragraph 5, of ACHR and in article 9, paragraph 4, of Covenant II. It goes without saying that the defendant has to be able to file an application for habeas corpus if, after having been brought before the judge (see above), he remains in detention for an unduly long period awaiting trial. Detention thus becomes unlawful because of the duration of the deprivation of liberty and the habeas corpus procedure enables an order to be issued for the detainee's release until the time of the trial. One very interesting aspect of the multiple facets which the right to habeas corpus can assume is to be found in the United States, where this

right, in the 1966 revised version, permits prisoners or other complainants who have suffered or consider themselves to have suffered an injury through State procedure to obtain justice from the federal court.

7. For an application for habeas corpus to be effective, the court responsible for verifying the lawfulness of the deprivation of liberty must correspond to the definition given by the European Court. That is, the authority called on to give a ruling must be judicial, must be independent of the executive power and the parties concerned and must offer the fundamental procedural guarantees applied in cases of deprivation of liberty. To know whether a procedure offers satisfactory guarantees not only must the notion of a fair trial be referred to but the specific nature of the circumstances in which the trial takes place must be considered. As regards the requirement of impartiality and independence, there is no need to re-emphasize the point. We would, however, like to stress the importance of: prohibiting emergency courts; the lack of competence, ratione personae and ratione materiae, of military courts in relation to the civilian population (possibly it would sometimes be desirable that even soldiers should have the possibility of an external remedy; and more specifically, the court should be exclusively composed of judges who are members of the judiciary stricto senso.

8. For cases of deprivation of liberty of undetermined duration due to factors that are extraneous to any conviction and may change fairly rapidly (for example, the mental health of mentally disturbed persons or the dangerous nature of recidivists), periodic verification of the lawfulness of the detention is essential. Where there is no automatic and regular remedy, the detainee or his representative must be able to institute habeas corpus proceedings without much difficulty and the court must be able to rule promptly on the current situation of such extraneous factors, and order immediate release if there is no longer any reason for the detention.

9. In the interest of ensuring the effectiveness of the right to habeas corpus the detainee should be informed of this possibility, particularly if he does not have or no longer has the assistance of legal counsel. The Standard Minimum Rules for the Treatment of Prisoners adopted by the United Nations General Assembly, and the rules adopted by the Committee of Ministers of the Council of Europe (1987 revised version), make it a duty to inform the prisoner of the possible remedies. Furthermore, the right to be informed of the existence of such supervision is particularly important because of the periodic verification of the lawfulness of detention which is not automatic (see above): mentally ill persons or recidivists deprived of liberty and left to themselves for an undetermined period without being informed of their rights are exposed to all kinds of arbitrariness.

10. Remedies external to the prison administration should also be established. Such remedies would complement the right to habeas corpus and would ensure better protection of detainees by reducing any risk of torture or inhuman treatment in the form of disciplinary or other sanctions. The Paraguayan Constitution, in article 133, paragraph 3, provides for the possibility of applying for habeas corpus in cases of physical, psychological or moral violence which exacerbate the conditions of a person lawfully deprived of liberty.

11. Finally, we will consider the tricky issue of derogations when a "state of emergency" is declared. All international instruments allow a State to derogate from its obligations in time of public emergency threatening the life of the nation (see art. 15, ECHR; art. 27, ACHR; art. 4, Covenant II). However, the list of non-derogable guarantees appearing in each of the above-mentioned conventions varies in length.

12. Article 27, paragraph 2, of ACHR is the only one to stipulate that the suspension of the indispensable guarantees for the protection of non-derogable rights is not authorized. In an advisory opinion (OC-9/87), the Inter-American Court has specified the scope of this provision: the indispensable judicial guarantees not susceptible of derogation include habeas corpus, amparo and any other effective remedy applied for to the judge or competent court and having the purpose of ensuring respect for all rights and freedoms whose suspension is not authorized by the Convention. It went on to state that all judicial guarantees must be exercised in full accordance with the legal procedures respecting the right to a fair trial.

13. We commend the jurisprudence of the Human Rights Committee which is not in favour of any suspension of the right to habeas corpus, and we can only endorse the view of the Special Rapporteur when he states that the opinion of the Inter-American Court is universal in scope and declares that "if the derogation from a given right would cause violations of another right which is non-derogable, derogation of the former cannot be permitted, regardless of whether or not it appears in the list of non-derogable rights" (see fourth report on states of emergency, E/CN.4/Sub.2/1991/28).

14. We emphasize once again the danger to the effectiveness of the right of each person in pre-trial detention to be brought before a judge that is posed by national legislation permitting an extension of the stipulated time limit for appearance before a judge during a state of emergency or other special circumstances (serious crimes, terrorism, etc.). Normally, this decision is taken by an executive authority. The risk with such a flexible approach is that the exception becomes the rule even without justification and that the notion of "special circumstances" takes on too broad a meaning.

15. Some bodies of domestic legislation do not derogate from the right to habeas corpus, but do authorize administrative detention (that is, placing the defendant at the disposal of the executive power) without the intervention of judicial bodies. We believe that in these cases, a judge presented with an application for habeas corpus should not limit himself to merely taking note of the existence of a state of emergency and the conformity of the detention with the powers conferred on the administrative authorities by virtue of that state of emergency. He should also examine the legitimacy of the state of emergency and the interdependence between the grounds justifying the deprivation of liberty and those authorizing the state of emergency (as stipulated in the Argentine Act No. 23048 of 20 October 1984). The habeas corpus judge should also have the power to inspect the places where the missing beneficiary of the said right may be presumed to be found (see art. 9 of the Declaration on the Protection of All Persons from Enforced Disappearances, of 18 December 1992, which provides for it expressly).

16. The American Association of Jurists would welcome the formulation of a draft declaration on the application of fundamental remedies for the protection of human rights and the essential procedural guarantees which must accompany them. This draft could include, among others, the following principles:

A. 1. For all persons arrested (in pre-trial detention), the guarantee of being brought before an independent and impartial judge with authority to order a release is an autonomous, unconditional, automatic and non-derogable right.

2. This right must be exercised within not more than 24 hours following the deprivation of liberty.

3. The person deprived of liberty has the right to appear personally before the judge, to be heard and to be assisted effectively by a lawyer with whom he has communicated since the start of the detention.

B. 1. Any person deprived of his liberty has the right to appeal to a competent court comprising judges who will rule promptly on the lawfulness of the detention, and order his release if the detention is unlawful. This right exists already when there is a serious and imminent threat of deprivation of liberty.

2. The person deprived of liberty must be informed of his right to appeal for a ruling on the lawfulness of his detention.

3. The person deprived of liberty should enjoy the appropriate fundamental procedural guarantees for his situation, more specifically:

(a) The right to be heard and to appear in person;

(b) The right to be assisted effectively by a lawyer;

(c) The right to have access, either personally or through his representative, to the file of the case;

(d) The right to be brought face to face with possible witnesses and experts;

(e) The right to obtain a reasoned judgement.

4. Periodic verification at reasonable intervals of the lawfulness of the detention must be guaranteed in certain situations of deprivation of liberty of undetermined duration, particularly those concerning mentally disturbed persons and recidivists. If such verification is not automatic, the person concerned should himself or through his representative be able to set the procedure in motion without difficulty.

5. It goes without saying that the guarantees provided for in subparagraphs B.1, B.2 and B.3 also apply to such periodic verification.

6. All the rights referred to in subparagraph B are non-derogable.

7. When a state of emergency is declared, the habeas corpus judge must be able to verify the lawfulness of the state of emergency and the interdependence between the grounds justifying the deprivation of liberty and those authorizing the state of emergency.

8. The habeas corpus judge must have access to all places where persons deprived of liberty are held and all parts of these places if there is reason to believe that a missing person who is the subject of a habeas corpus application may be found there.

C. Any person lawfully deprived of liberty must be authorized to make a request or complaint concerning the conditions of his detention to a judicial authority or other competent authorities.